

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

JUL 16 2009

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2008-0326
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
DAVID PATRICK YOUNG,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20073899

Honorable Barbara C. Sattler, Judge Pro Tempore
Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART

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E S P I N O S A, Presiding Judge.

¶1 Following a jury trial, appellant David Patrick Young was convicted of possession of a narcotic drug, a class four felony, and possession of drug paraphernalia, a class six felony. He was sentenced to concurrent terms of incarceration, the longer for 3.5 years. In addition, the trial court imposed fines, surcharges, and fees amounting to over \$4,000, and reduced them to a criminal restitution order (CRO). On appeal, Young contends the CRO should be vacated and also challenges the court's jury instruction defining reasonable doubt. We affirm in part and vacate in part.

Discussion

¶2 Young contends the trial court's entry of the CRO was premature, constituting an illegal sentence that must be vacated as fundamental error. The State concedes error on this point, and we agree. *See State v. Lewandowski*, 220 Ariz. 531, ¶¶ 10-11, 207 P.3d 784, 788 (App. 2009). Accordingly, we vacate the CRO.

¶3 Young also asserts the trial court's instruction defining reasonable doubt unconstitutionally changed the state's burden of proof. In accordance with *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995), the court instructed the jury as follows:

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you

think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

The Arizona Supreme Court has required, “as a matter of state law,” that all trial courts instruct juries using this language to ensure that the reasonable doubt instruction comports with due process. *Id.* Young nevertheless argues the wording of this instruction lowers the state’s burden of proof from a “reasonable doubt” standard to the lower, “clear and convincing” standard. Citing *Cage v. Louisiana*, 498 U.S. 39, 40 (1990), Young maintains the “real possibility” language impliedly shifts the burden of proof from the prosecution to the defense, because “the reasonable doubt standard does not require a ‘real possibility’ of innocence, but only requires some doubt about guilt.”

¶4 However, as Young acknowledges, our supreme court has repeatedly affirmed the constitutionality of the language prescribed in *Portillo* and rejected similar constitutional challenges. *See, e.g., State v. Dann*, 220 Ariz. 351, ¶ 65, 207 P.3d 604, 618 (2009); *State v. Garza*, 216 Ariz. 56, ¶ 45, 163 P.3d 1006, 1016-17 (2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 890 (2008); *State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916 (2006); *State v. Glassel*, 211 Ariz. 33, ¶ 58, 116 P.3d 1193, 1210 (2005). Because we have no authority to disagree, *see State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003), we do not address this argument further.

Disposition

¶5 For the foregoing reasons, we vacate the portion of the trial court's sentencing order reducing all imposed fines, fees, and surcharges to a CRO. In all other respects, Young's convictions and sentences are affirmed.

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

JOHN PELANDER, Judge